

DEPARTMENT OF STATE REVENUE

Revenue Ruling #2016-07ST
November 4, 2016

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ISSUES

Sales and Use Tax - Sales Made through an Online Marketplace

Authority: [IC 6-2.5-1-24](#); [IC 6-2.5-1-26.5](#); [IC 6-2.5-1-27.5](#); [IC 6-2.5-1-28.5](#); [IC 6-2.5-2-1](#); [IC 6-2.5-2-2](#); [IC 6-2.5-4-1](#); [IC 6-2.5-4-6](#); [IC 6-2.5-4-16.4](#); [IC 6-2.5-6-14.1](#); [IC 6-2.5-8-8](#); [IC 6-8.1-9-1](#); [45 IAC 2.2-1-1](#); [45 IAC 2.2-4-2](#); [45 IAC 2.2-4-27](#)

A taxpayer ("Company") is seeking a determination regarding Company's responsibility to collect Indiana sales tax. Specifically, the Company seeks a ruling regarding the following:

1. Whether a third party vendor will be required to collect sales tax on sales made through Company's online marketplace if Company collects and remits sales tax on these sales.
2. Whether Company may accept properly completed exemption certificates from customers listing Company as the seller, which will relieve both Company and third party vendors from tax collection responsibility. If the answer is in the affirmative, Company questions whether it may seek a credit or refund from the Department for over-collected sales tax.

STATEMENT OF FACTS

Company provides the following facts regarding its request for a revenue ruling:

[Company] develops and markets a wide range of software, services, and digital products. In connection with these products, [Company] operates a marketplace for third-party software, games, apps, movies, books, and other digitized products available for customers to purchase and download electronically using their personal computers, tablets, game consoles, phones, and other devices. Although the marketplaces are separately branded . . . [they] will [be] refer[red] to . . . collectively as "Marketplace."

Customers gain access to the Marketplace, using their computing devices. Customers may search a catalog that identifies the title and the third-party vendor ("Independent Software Vendors" or "ISVs") of the digitized content available for purchase . . . To initiate a purchase, the customer selects a title to add to the shopping basket. The customer checks out, using a credit card or other form of payment. [Company] processes the payment, using its own payment infrastructure, and provisions the product from one of its data centers. The sale may include titles from more than one ISV. [Company] is not required to obtain approval from the ISVs prior to the sale.

Under the Marketplace arrangements, ISVs enter into service agreements with [Company] whereby [Company] agrees to host and provision (i.e., electronically deliver) digitized products to customers on each ISV's behalf, process the customer's payments, and remit the proceeds to each ISV—less [Company]'s service fee. [Company] is entitled to withhold the service fee, equal to a percentage of the Marketplace product's sales price, from the sales proceeds. [Company] also calculates the appropriate amount of sales tax due on the transaction and remits the sales tax directly to the Department.

[Company] does not sublicense the digitized content to the customer. The license agreement is directly between the ISV and the customer. The ISV, as the licensor, determines the price at which the software or other products are sold to end customers.

DISCUSSION

Pursuant to [IC 6-2.5-2-1\(a\)](#) and [IC 6-2.5-2-2\(a\)](#), "the state gross retail tax" (or "sales tax") is imposed on retail transactions made in Indiana. A retail transaction is defined in [IC 6-2.5-4-1\(b\)](#) as the transfer, in the ordinary

course of business, of tangible personal property for consideration.

[IC 6-2.5-1-8](#) defines a "retail merchant" as "a person who is described as a retail merchant in [IC 6-2.5-4](#) or who is required to hold a retail merchant's certificate under [IC 6-2.5-8](#)." [IC 6-2.5-1-3](#) goes on to define a "person" as follows:

. . . an individual, **assignee**, receiver, commissioner, fiduciary, trustee, executor, administrator, institution, national bank, bank, **consignee**, firm, partnership, joint venture, pool, syndicate, bureau, association, cooperative association, society, club, fraternity, sorority, lodge, corporation, limited liability company, Indiana political subdivision engaged in private or proprietary activities, estate, trust, or any group or combination acting as a unit. (**Emphasis added**).

Sales of specified digital products are also included in the definition of retail transactions. [IC 6-2.5-4-16.4\(b\)](#) provides that a person engages in making a retail transaction when the person (1) electronically transfers specified digital products to an end user; and (2) grants to the end user the right of permanent use of the specified digital products that is not conditioned upon continued payment by the purchaser. "Specified digital products," as currently defined by [IC 6-2.5-1-26.5](#), include only digital audio works (e.g., songs, spoken word recordings, ringtones), digital audiovisual works (e.g., movies), and digital books. Products "transferred electronically" are defined at [IC 6-2.5-1-28.5](#) to mean products that are "obtained by a purchaser by means other than tangible storage media."

Pursuant to Section 333 ("Use of Specified Digital Products," effective Jan. 1, 2010) of the Streamlined Sales and Use Tax Agreement ("SSUTA," effective May 16, 2016), of which Indiana is a signatory, "A member state shall not include any product transferred electronically in its definition of 'tangible personal property.'" Pursuant to the same section of the SSUTA, "ancillary services," "computer software," and "telecommunication services" are excluded from the term "products transferred electronically."

In order to stay in conformity with the SSUTA, Indiana may not impose sales tax on a product transferred electronically by basing the product's taxability on inclusion of the product in the definition of tangible personal property. However, [IC 6-2.5-1-27.5\(c\)\(8\)](#) explicitly excludes ancillary services from the definition of telecommunication services, which are taxable under [IC 6-2.5-4-6](#). Accordingly, ancillary services are not subject to sales tax in Indiana either.

Based on the foregoing, Indiana may impose sales tax on products transferred electronically only if the products meet the definition of specified digital products, pre-written computer software, or telecommunication services.

"Prewritten computer software" is defined in [IC 6-2.5-1-24](#) as follows:

Subject to the following provisions, "prewritten computer software" means computer software, including prewritten upgrades, that is not designed and developed by the author or other creator to the specifications of a specific purchaser:

- (1) The combining of two (2) or more prewritten computer software programs or prewritten parts of the programs does not cause the combination to be other than prewritten computer software.
- (2) Prewritten computer software includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the purchaser.
- (3) If a person modifies or enhances computer software of which the person is not the author or creator, the person is considered to be the author or creator only of the person's modifications or enhancements.
- (4) Prewritten computer software or a prewritten part of the software that is modified or enhanced to any degree, where the modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten computer software. However, where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such a modification or enhancement, the modification or enhancement is not prewritten computer software.

Company's first question is whether an ISV will be required to collect sales tax on sales made through one of Company's Marketplaces if Company collects and remits sales tax on these sales instead. Noting that "retail merchants" are "persons," and that the definition of "persons" includes assignees and consignees, Company compares the transactions on Company's Marketplaces to consignment sales. Company points to [IC 6-2.5-6-17](#), which provides as follows:

- (a) A retail merchant that is a consignee in a retail transaction shall collect and remit the state gross retail tax on the gross retail income received in a consignment sale.

(b) The retail merchant shall provide the consignor purchaser an invoice that shows that the state gross retail tax was paid to the retail merchant with a clear notation on the invoice that the item was a consignment sale by the retail merchant on behalf of (insert the name of the seller) to (insert the name of the purchaser).

Sales Tax Information Bulletin #20 (October 2015) provides that: "The sale of consigned tangible personal property is a retail sale, and the consignee must register as a retail merchant and must collect and remit sales tax based on the gross retail income of the consignment sale." As further comparison, Company maintains that auctioneers are also considered retail merchants liable for tax, regardless of whether they own the underlying property. [IC 6-2.5-4-12](#).

Furthermore, an ISV is not a retail merchant making a retail transaction per [IC 6-2.5-4-1](#) or [IC 6-2.5-4-16](#). An ISV is not engaging in retail, since the ISV is not the person "transfer[ring] the property to another person for consideration" ([IC 6-2.5-4-1](#)) or "electronically transfer[ring] specified digital products to an end user" ([IC 6-2.5-4-16](#)). The transferring is done by Company. Company is the retail merchant making a retail transaction in the ISV's stead.

The Department therefore agrees that Company is the seller of the products on its various Marketplaces. Like an assignee or auctioneer, Company is required to collect sales tax when applicable and remit the tax to the Department. ISV is not responsible for collecting sales tax; in fact, once Company collects sales tax from a customer, an ISV must not also collect sales tax on that sale.

Company next questions whether the Company may accept properly completed exemption certificates from customers listing Company as the seller, and if so, whether it may seek a credit or refund from the Department for over-collected sales tax.

Generally, if a purchaser provides a properly executed exemption certificate (Form ST-105) to a retail merchant, the retail merchant has no duty to collect Indiana sales or use tax. [IC 6-2.5-8-8\(a\)](#). If Company receives a properly executed ST-105 from a customer, it is absolved from collecting Indiana sales tax.

Having said that, even though a retail merchant is responsible for collecting the sales tax in a retail transaction, the liability for payment of the sales tax is on the person that acquires the tangible personal property in a retail transaction. [IC 6-2.5-2-1\(b\)](#). Because the liability for the payment of the sales tax belongs to the customer, it would be the customers' obligation to file a claim for refund with the Department of Revenue pursuant to [IC 6-8.1-9-1\(a\)](#).

Alternatively, Company may refund the over-collected sales tax to its customers, after which Company may file a claim for refund with the state. [IC 6-2.5-6-14.1](#) provides that "a retail merchant is not entitled to a refund of [sales tax] unless the retail merchant refunds those taxes to the person from whom they were collected." Thus, should Company elect to refund sales tax to its customers, Company would then be entitled to file a claim for refund of sales tax paid with the Department of Revenue pursuant to [IC 6-8.1-9-1\(a\)](#). However, if Company does not refund sales tax to its customers first, Company cannot claim a refund with the Department.

Further, Company questions whether it is entitled to a credit or deduction for over-collected sales tax. Company cites to other examples where Indiana tax law allows a retail merchant to claim a credit or deduction, such as [45 IAC 2.2-6-12](#). However, this regulation permits a bad debt deduction. In fact, there is no legal authority for a retail merchant to claim a credit or deduction on sales tax that it over-collected. Again, the liability for the sales tax belongs to the customers, and it is the customers who are entitled to a refund if they paid sales tax on an exempt transaction. Company's only avenue for relief is to refund the sales tax to its customers, and then request a refund from the Department.

RULING

Company should collect sales tax for retail transactions made in its Marketplaces on behalf of its ISVs. ISVs may not thereafter collect sales tax on those same transactions. If Company receives properly completed sales tax exemption certificates from its customers, neither Company nor ISV are required to collect sales tax. If Company over-collects sales tax from its customers and remits the tax to the state, it may refund the sales tax to its customers, and then claim a refund with the Department. However, Company may not claim a deduction or credit on those taxes, and may not seek a refund without first refunding the taxes to its customers.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

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